APPENDIX A

[Filed May 10, 1968]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

Plaintiffs,

vs. Civil No. 66-1618-S

INDUSTRIAL WELFARE COMMISSION, NORTH AMERICAN AVIATION, INC., a corporation,

Defendants.

OPINION AND ORDER ON MOTION TO DISSOLVE THREE-JUDGE COURT

Before: JERTBERG, Circuit Judge, and
STEPHENS and GRAY, District Judges

STEPHENS, District Judge

This is an action brought for declaratory and other appropriate relief pursuant to the Civil Rights Act of 1964. Plaintiffs originally appeared by their counsel, Phill Silver & Philip Poppler. Subsequently, Evelyn E. Whitlow was substituted as counsel for plaintiff Velma L. Mengelkoch. Defendants Industrial Welfare Commission and Division of Industrial Welfare appear by their counsel Thomas C. Lynch, Attorney General, B. Franklin Walker, Jr. and William L. Zessar, Deputies Attorney General. Defendant North American Aviation, Inc. appears by its counsel Gibson, Dunn & Crutcher.

Plaintiffs, three female employees of defendant North American Aviation, Inc., are suing to have Section 1350 of the California Labor Code (a maximum hours for women law), declared unconstitutional as violating the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, or invalid as conflicting with Title VII of the Civil Rights Act of 1964 [24 U.S.C. § 2000(e)-7]. Plaintiffs, suing in their own behalf and purportedly in behalf of all similarly situated women in the State of California, seek to enjoin defendants California Industrial Welfare Commission and the California Division of Industrial Welfare from enforcing § 1350, C.L.C., and to enjoin defendant North American from further violations of Title VII of the Civil Rights Act.

Plaintiffs requested that a three-judge court be convened to hear and determine the case pursuant to Title 18 U.S.C. § 2281 and § 2284. A three-judge court was appointed and convened. Defendants Division of Industrial Welfare and the Industrial Welfare Commission filed a motion to dismiss.[1] Defendants' motion seeks three separate kinds of relief: (1) to dissolve the three-judge court; (2) to dismiss the complaint as against them on the ground that, as state agencies, they are immune from suit; and (3) to dismiss the action on the ground that the court, in the exercise of its discretion, should abstain from adjudicating the merits of this case.

STATEMENT OF THE ISSUES

The ultimate merits of plaintiffs' claims are not now before the court. Nevertheless, it is appropriate to briefly mention the substance of the laws in issue. Section 1350 of the California Labor Code prohibits the working of females in certain employments for more than eight hours a day or forty-eight hours a week. Since the institution of this action, this

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[1] Defendant North American has not joined in the motion to dismiss. A stipulation has been entered into giving North American time to plead after the disposition of the motion to dismiss.

section was amended to provide an exception to its terms pursuant to section numbered 1350.5 which was added in 1967. Where applicable this new section authorizes the employment of women up to ten hours per day and provides for overtime pay. In 1967 a new section numbered 1357 was added.

There are two distinct issues, one relating to the Equal Protection Clause and the other to Title VII of the Civil Rights Act of 1964.

Issue No. 1

Section 1350 is said to violate the Equal Protection Clause of the 14th Amendment. In general, the Equal Protection Clause prohibits unreasonable classifications in state laws, including classifications based upon sex. The question is one of the reasonableness of the classification made in the state regulatory statute.

Issue No. 2

Section 1350 is said to be in conflict with Title VII of the Civil Rights Act of 1964. The Supremacy Clause of the Constitution dictates that a state statute which conflicts with a valid federal statute cannot stand. The federal statute, Title VII, prohibits an employer from discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment based upon, inter alia, that employee's sex. It also prohibits an employer from limiting, segregating or classifying his employees in any way which would deprive them of employment opportunities or otherwise adversely affect their status as employees because of their sex. 42 U.S.C. § 2000 (e)-2(a). There is no "savings clause" for state protective laws for women in Title VII. However, Title VII does provide that an employer does not have to comply with a state statute requiring him to do acts which Title VII makes unlawful.

Plaintiffs claim that a state law which forbids an employer from allowing women to work overtime at premium

pay compels discrimination with respect to compensation and privileges of employment by reason of their sex. The question is whether the state law conflicts or is inconsistent with the federal law. If it does, the federal law prevails.[2]

PROPRIETY OF A THREE-JUDGE COURT.

Section 2281 provides for a three-judge court where an injunction is sought restraining the enforcement of a state statute upon the ground that it is unconstitutional. Section 2281 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement, or execution of such statute or any order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof *upon the ground of unconstitutionality of such statute* unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Italics supplied.)

A. *Substantial Constitutional Issue*

It has been consistently held that a *substantial* constitutional question must be raised in order to invoke a three-judge court. *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938). Lack of substantiality of the constitutional issue may exist because prior Supreme

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[2]There is a time-honored rule of constitutional adjudication that the court will not pass upon a constitutional question if there is some other ground upon which the case may be disposed of. In other words, the court will not reach the merits of the constitutional issue when a decision on some lesser ground renders it unnecessary. *Kent vs. Dulles*, 357 U.S. 116 at 129 (1958); *Ashwander vs. TVA*, 297 U.S. 288 at 347 (1936). Accordingly, the court should pass upon the merits of the federal-state conflict issue before reaching the Equal Protection issue. If it is held that the state law is in conflict with the federal law, it will be unnecessary to pass upon the Equal Protection issue. *Boynton vs. Virginia*, 364 U.S. 454, 457 (1960).

Court decisions make clear that it is without merit. *California Water Service Co. v. City of Redding, supra; German v. South Carolina State Ports Authority,* 295 F.2d 491 (5th Cir., 1961); *People of State of Ill. ex. rel. Sankstone v. Jarecki,* 116 F.Supp. 422 (D.C. Ill., 1953); appeal dismissed 346 U.S. 861; *Bradley v. Waterfront Commission of New York Harbor,* 130 F.Supp. 303 (D.C. N.Y., 1955); *Blass v. Weigel,* 85 F.Supp. 775 (D.C. N.J., 1949). The insubstantiality is especially apparent when previous decisions of the Supreme Court have specifically upheld the state statute in question against attack on constitutional grounds. *German v. South Carolina State Ports Authority, supra.*

The first issue raised by plaintiffs is that Section 1350 is unconstitutional as a denial of "equal protection of the laws." (See, Complaint ¶ XXIV) The constitutionality of Section 1350[3] was challenged in *The Matter of Application of Miller,* 162 Cal. 687, 124 P. 427 (1912) and *Miller v. Wilson,* 35 S.Ct. 342 (1915) as a deprivation of liberty to contract and a denial of equal protection. The Supreme Court held that the California statute was constitutional. The statute was found to be a reasonable regulation by the state to safeguard the public health. In so holding, the court regarded its prior decisions upholding other state maximum hours for women laws as decisive.

In *Miller,* the court quoted at length from the landmark case, *Muller v. Oregon,* 28 S.Ct. 324, 208 U.S. 412 (1908), the first Supreme Court case to uphold the constitutionality of a state maximum hours law. Cf. *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539 (1905). In *Muller,* the validity of an Oregon law limiting the hours of labor of females was attacked on constitutional grounds. The constitutionality of the statute was sustained.

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[3]The California maximum hours for women statute has been amended to add a few additional types of employments. Stats. 1939, c. 1072, p. 2297, § 1 and in 1967 as noted in the text of this opinion. However, it is derived from and is substantially the same as its statutory antecedent challenged in *Miller v. Wilson, supra.* Stats. 1911, c. 258, p. 437, § 1.

The decision was based upon considerations relating to woman's physical structure, her maternal functions, and the vital importance of her protection in order to preserve the strength and vigor of the race. "She is properly placed in a class by herself," the court stated (28 S.Ct. at 326-327), "and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . . Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him [man], it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the struggle for subsistence. This difference justifies a difference in legislation." . . .

Suffice it to say that the Supreme Court has passed upon and rejected the contention that state maximum hours for women laws violate the Equal Protection Clause. The restriction on working hours which such statutes impose on women, as a special class, has been held to be a reasonable one. *Muller v. Oregon*, followed in *Miller v. Wilson*, is still the law as declared by the Supreme Court. There have been no intervening decisions of the court in cases which are closely analagous which would lead to the conclusion that the basic rationale of these cases has been discarded or even seriously eroded.

But plaintiffs contend that times have changed and so should the law.

These decisions were handed down nearly sixty years ago. The *Muller-Miller* rationale was based on medical data available at that time.[4] There are notions expressed in the opinions which may no longer be viable in view of the role of women in today's society. In *Muller*, the Supreme Court stated (28 S.Ct. at 326):

> ". . . History disclosed the fact that woman has always been dependent upon man."

What seemed so clear to the court in 1908 is not so clear in light of contemporary American society. In view of the increased percentage of women in the work force and as heads of households, the absolute dependency of woman on man, so obvious in the 19th century, is not so apparent today. Since the time of the *Muller* decision, women have obtained the right to vote. (The 19th Amendment became effective on August 26, 1920.)

In general, women have achieved a larger degree of contractual, personal and political rights equal with men. Nearly all of woman's civil disabilities have been removed. In the 19th century she was viewed as physically, socially and economically inferior to man. The laws buttressed this view. In the eyes of the law today, she is man's equal and to be accorded the same rights and privileges as her male counterpart.

It is argued that women's maternal function is less time-consuming than it was at the turn of the century. The average woman has fewer children today. (The average American family has less than two children—approximately

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[4] It was in *Muller vs. Oregon* that Louis Brandeis, representing the State of Oregon, submitted his famed brief containing medical and socio-economic data tending to establish the reasonableness of the state's classification by sex to protect the female of the human species. In *Muller*, the court took into account medical opinions of the day to the effect that long hours were injurious to the health of females and adversely affected their procreative functions.

1.7 children per family.) There is a far greater number of women working today. (Women comprise 30% of the nation's work force.) A substantial number of women are heads of households.

In addition, it is argued that the economic conditions giving rise to the maximum hours legislation no longer prevail or, to the extent that they still exist, they can be regulated by premium pay for overtime laws which do not distinguish as to sex. In sum, the plaintiffs are contending that maximum hours for women laws are unreasonable in light of the changes in the conditions and functions of women in today's society.

On the other hand, this may depend upon the character of the employment. The classification of women as a group needing some particular protection of the law may still be reasonable for many purposes. It has also been pointed out that the abandonment of limitations on working hours for women would place women on an equal basis with men in the matter of overtime pay, but at the same time would also make them subject to the obligation to perform as much overtime work as required of men. This is a mixed blessing. It is not a matter of letting women earn overtime when they want to, but an obligation to work overtime whether they want to or not on pain of being discharged. This could result in women being squeezed out of certain industrial work rather than broadening the employment base and opportunity for women in industry. It is not so certain as plaintiffs assume that their position represents the will of many other women, even if similarly situated.

Plaintiffs have not distinguished the issue presented from the one presented in *Muller v. Oregon, supra.* The principle of *stare decisis* must ultimately control the decision at the district court level. A Supreme Court decision is as binding as statutory law. The district court, even sitting as a three-judge tribunal, cannot reverse the Supreme Court. When the law has developed through intervening decisions to the

point that it has become clear that the Supreme Court has abandoned the reasoning which gave rise to an earlier decision and that the law has in fact changed and all that is needed is recognition, then an inferior court should recognize what is obvious and act accordingly. However, there has been no line of decisions which cast doubt upon the basic holding of *Muller*. Therefore, this case does not present a substantial constitutional issue. Mere speculation as to what the Supreme Court might do in the light of the changed circumstances will not suffice to take this issue out of the insubstantial category.

B. *Supremacy Clause: Federal-State Statutory Conflict*

Plaintiffs contend that, if section 1350 does not violate the Equal Protection Clause, it is nevertheless invalid in that it conflicts with a federal statute, viz.; Title VII of the 1964 Civil Rights Act. It is a well-established axiom of constitutional law that the Supremacy Clause operates to invalidate a state law in conflict with (or in an area preempted by) a valid federal law. *Gibbons v. Ogden*, 9 Wheat 1 (1820); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). In this sense, the claimed invalidity of a state law conflicting with a federal law is premised on a provision of the Constitution.

Nevertheless, the Supreme Court has held that the three-judge court requirement of 28 U.S.C. § 2281 applies only to actions which rely upon substantive provisions of the Constitution, e.g., the First Amendment, the Due Process or Equal Protection Clauses, the Commerce Clause, etc., to support the claimed invalidity of the state statute. (As discussed above, a substantial issue must be raised with respect to the constitutionality of the state law under a substantive constitutional provision.) But 28 U.S.C. § 2281 does not apply to Supremacy Clause issues involving, as they do, only a federal-state statutory conflict. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

In *Swift*, the Supreme Court examined the legislative purpose in enacting the provisions conferring jurisdiction

on three-judge courts. 28 U.S.C. §§ 2281-2284. These provisions were designed to obtain a more responsible and authoritative tribunal for the litigation of suits attacking the constitutionality of a state law. By providing for direct review by the Supreme Court, 28 U.S.C. § 1253, a final determination on the merits is expedited.

However, the court observed that cases arising under the Supremacy Clause involved the construction of state and federal laws rather than an interpretation of a substantive provision of the Constitution. In essence, the constitutionality of the state law is not challenged. Under the *Swift* doctrine, there is no jurisdiction for a three-judge court where the claim of invalidity is grounded in the Supremacy Clause.

C. *Civil Rights Act of 1964*

Plaintiffs contend that they are entitled to invoke a three-judge court by virtue of a provision in Title VII of the Civil Rights Act. See 42 U.S.C. § 2000(e)-6(b). This provision confers jurisdiction upon the district courts over actions brought for a violation of Title VII. It also permits the Attorney General of the United States to request a three-judge court in an action where he certifies that the case is of general public importance. In the event the Attorney General does not file such a request, the action is to be heard and determined by a single judge.

It is obvious that only the Attorney General has the authority to invoke a three-judge court under this provision. The Attorney General has not seen fit to do so in this case. There is no provision in Title VII giving an individual litigant the right to have an action adjudicated by a three-judge court.

In sum, there is no jurisdiction for a three-judge court. Plaintiffs have failed to raise a substantial constitutional issue under the Equal Protection Clause. There is no jurisdiction for a three-judge court on a claim of invalidity grounded in the Supremacy Clause. Moreover, plaintiffs are

not entitled to invoke a three-judge court under any provision of the Civil Rights Act itself. A three-judge court is not appropriate in this case.

IT IS HEREBY ORDERED that defendants' motion to dissolve the three-judge court be and the same is hereby granted.

DATED: May 10, 1968.

/s/ Gilbert H. Jertberg
Circuit Judge

/s/ Albert Lee Stephens, Jr.
District Judge

/s/ William P. Gray
District Judge

[Filed May 10, 1968]

[Caption Omitted]

MEMORANDUM OF OPINION AND ORDER OF DISMISSAL

The three-judge court appointed in the above-captioned case having been dissolved by order which has been filed on this date, the case now reverts to the undersigned judge to whom the case was originally assigned. There is pending the defendants' motion to dismiss and this memorandum of opinion and order is addressed to the pending motion. The order dissolving the three-judge court is incorporated in this memorandum by reference.

DOCTRINE OF ABSTENTION

Defendants have moved the court to dismiss this case in its entirety by invoking the doctrine of abstention. Defendants ask the court, in the exercise of its equitable discretion, to abstain from adjudicating the merits of this action.

The avowed purpose of plaintiffs has been to obtain an adjudication by a three-judge court so that an appeal may then be taken directly to the Supreme Court, thus avoiding all intermediate appellate action which would be the normal course and which would defer consideration by the Supreme Court. While the attack is made upon the laws of California, plaintiffs' goal is in reality to obtain a ruling on constitutional grounds which as a precedent would dispose of limitations on working hours for women throughout the United States. There has been widespread interest in this action as is witnessed by the fact that the National Federation of Business and Professional Women's Clubs, Inc. and the National Organization for Women, a corporation, (both corporations headquartered in Washington, D.C.) have sought to file a brief, present evidence and argue the case as *amicus curiae* and the California Labor Federation, AFL-CIO, has sought to intervene. Divergent views on the merits are expressed by these would-be participants.

From what has already been said, plaintiffs' major objective of a direct and early appeal to the Supreme Court on the merits is not attainable because a three-judge court has been found to be inappropriate and has been dissolved. The court now turns to the motion to dismiss on the ground that the court should abstain from adjudicating the merits of this action.

As a general rule, the federal courts have no right to decline to exercise jurisdiction where it exists. *Cohens vs. Virginia,* 6 Wheat 264, 5 L. Ed. 257 (1821); *Wilcox vs. Consolidated Gas Co.,* 212 U.S. 19, 40 (1909). There is a line of authority, however, which recognizes the propriety of abstention by a federal court in a limited number of factual situations. Generally speaking, there are three situations in which abstention has been held proper. All of them involve a suit where state action is being challenged in federal court as contrary to the federal Constitution or laws. Abstention is proper:

(1) To avoid decision of a federal constitutional question where the case may be disposed of on questions of state law;

(2) To avoid needless conflict with the administration by a state of its own affairs, and;

(3) To leave to the states the resolution of unsettled questions of state law.

These various situations necessarily overlap at times, and their underlying purpose is the same, to wit, to obviate unnecessary friction in the federal system.

The leading case supporting abstention is *Railroad Commission of Texas vs. Pullman Co.*, 312 U.S. 496 (1941). In this case the Pullman Company was seeking to enjoin the enforcement of an order of the Texas Railroad Commission, claiming that the order denied its rights under the 14th Amendment and claiming also that under Texas law the Commission lacked authority to make the order in question. While a federal court has jurisdiction to decide an ancillary state issue, the Supreme Court ordered the district court to abstain from deciding the case, but to retain jurisdiction until the parties had an opportunity to obtain a state court decision on the state issues involved. In this way the state court decides the state issue and the federal court avoids deciding a federal constitutional issue prematurely or unnecessarily, since if the state court should hold the order unauthorized as a matter of state law, there is no need for the federal court to pass on the federal question.

It has also been held that abstention is appropriate where the issue involves a specialized aspect of a complicated state regulatory law. *Burford vs. Sun Oil Co.*, 319 U.S. 315 (1943). In general, where there is adequate administrative and judicial review of state administrative action or orders, plaintiffs will not be allowed to short-circuit this process by bringing a federal action if bypassing of state administrative remedies would be disruptive to the state regulatory scheme. In the above case the Supreme Court held that the federal

court may abstain and dismiss the action. Again, where the state law in question is doubtful or unconstrued by the state court, abstention may be proper. *Louisiana Power & Light Co. vs. City of Thibodaux*, 360 U.S. 25 (1959).

It is clear, however, that abstention should not be ordered where the relevant state law is unambiguous or settled [*Davis vs. Mann*, 377 U.S. 678 (1963); *Public Utilities Commission of State of Calif. vs. United States*, 355 U.S. 534 (1958)], or where the state statute would be invalid no matter how it may be construed by the state courts. *Harman vs. Forsenius*, 380 U.S. 528 (1965); *Turner vs. City of Memphis*, 369 U.S. 350 (1962).

As appears from the discussion in the order dissolving the three-judge court, the federal constitutional questions relative to the California law are settled. It is proper to legislate concerning women as a class when this is in the interest of the public health and welfare. A law reasonably directed toward the preservation of the public health and welfare is not unconstitutional even though reasonable men may differ in opinion as to whether it will or will not accomplish the purpose.

The California law was re-examined by the legislature in 1967, quite obviously with applicable federal laws being given consideration. Specific reference is made in California Labor Code § 1350.5 to Section 13 of the Fair Labor Standards Act, as amended through February 1, 1967. There is no reason to think that the Civil Rights Act of 1964 was not also carefully considered. The legislature enlarged the working hours of women who are covered by the Fair Labor Standards Act from eight hours to ten hours. (Calif. Labor Code § 1350.5) Plaintiffs in this action are covered by the Fair Labor Standards Act and, therefore, have had their working hours enlarged. This is at least a step in the direction they want the law to take. The legislature also added a savings clause. (Calif. Labor Code § 1357.)

There is nothing about these recent changes in the California law which renders inapplicable the judicial pronounce-

ments that the legislative purpose is to protect the public health and welfare by restricting the hours of labor for women in certain occupations. Reasonable men still may differ on the subject, but the federal court is still bound by *The Matter of Application of Miller*, 162 Cal. 687, 124 P. 427 (1912).

The Supremacy Clause of the United States Constitution dictates that a federal statute will prevail over a state statute when the two are directly in conflict. Plaintiffs claim that the California Labor Code's restrictions upon the working hours of women is in direct conflict with the federal statute. The federal statute is quite clear on its face. It provides that among people employed in interstate commerce there shall be no discrimination in employment because of sex. This means that women should neither be favored nor handicapped because of sex. However, if there is a rational basis dependent upon other factors for treating women differently than men, then this is not a discrimination because of sex. In *Ward vs. Firestone Tire and Rubber Co.*, 260 F. Supp. 579 (1966) it was held that a man who was refused a transfer to a job earmarked as "light work," and open only to women and men who had physical defects, was not discriminated against and that the restriction on eligibility for the job had a bona fide relation to occupational qualification. California Labor Code §§ 1250 to 1253, inclusive, protect women (but not men) when required to move heavy objects, prohibit women from lifting more than 50 pounds or carrying up or down stairs an object weighing more than 10 pounds. These provisions have not been challenged.

Title 42 U.S.C. § 2000h-4 provides that Congress does not intend to occupy the field of civil rights to the exclusion of state laws on the same subject matter and that state laws which are not inconsistent with the purposes of express provisions of the federal Civil Rights Act are not invalidated. The purpose of the Civil Rights Act, as it applies to discrimination because of sex, is to eliminate the frictions, tensions

and financial inequities of discrimination on the basis of sex all for the purpose of benefiting and improving the free flow of commerce between the states. The purpose of the California restriction upon the working hours of women is not by any means as apparent.

As a result of the 1967 amendment which added § 1350.5 to the Labor Code, California restricts the hours of women who are laboring in interstate commerce to ten hours per day, while apparently restricting other women laboring at the same job to eight hours per day. This is a discrimination between one woman and another of which the plaintiffs cannot complain since they are the beneficiaries of longer hours which is in accord with their desires, nor is this a federal-state conflict. However, it makes suspect the true present purpose of the limitation of working hours for women. Are these restrictions truly based upon a concern for the public health and welfare, a determination to restrict the number of women in industry in favor of male employees or to protect women against the competition of men? It is an anomaly that the federal court should first be asked to pass upon an alleged conflict between state and federal law when the issues focus upon the state law.

Issues of state constitutional law are involved. Those constitutional issues treated in *The Matter of Application of Miller, supra,* are involved and a good case can be made for a re-examination. Turning to the California Constitution, Article 1 § 11 provides, "All laws of a general nature shall have uniform operation." This was dismissed in 1912, but then the law provided a uniform eight hour day for all women subject to a limitation on their working hours. Article 1 § 1 still provides, "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and preserving and obtaining safety and happiness." Article 20 § 18 provides, "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation

or profession." These constitutional provisions are unmistakably in the field of civil rights and do not conflict with the Civil Rights Act of 1964.

On the surface, at least, it would seem that if the state law in question is in conflict with the Civil Rights Act of 1964, it would also conflict with these provisions of the California Constitution. The state courts themselves have greater freedom in examining and re-examining state laws. Furthermore, they have greater flexibility in resolving the potential problems, especially since they are in a position to interpret and apply the provisions of the state Constitution as well as the Constitution and laws of the United States. The savings clause, California Labor Code § 1357, would further suggest that it would be advisable for the issues of this case to be presented to the state courts which could consider, among other things, whether such a clause can compel piecemeal litigation of the basic issue.

The importance of the questions which are raised by a threat to the validity of laws affecting working women as a class from the standpoint of the orderly administration of the law by the state is enormous. There is no serious problem of interpretation or construction of the federal law which can as easily be applied by state as federal courts, but there are serious problems of interpretation and construction of the state law. The considerations which have traditionally moved the federal courts to abstain from decision in deference to the state courts are all present in the circumstances of this case. The case may be disposed of on questions of state law and federal constitutional questions (if they exist) may be avoided. Needless conflict with the administration by the state of its own affairs may be avoided and this course leaves to the state the resolution of unsettled questions of state law, including both the issues which might be adjudicated in the federal court and others which are purely of state concern.

For the foregoing reasons it is proper that judgment should be entered dismissing this action without prejudice. Defend-

ants' motion to dismiss is granted and IT IS ORDERED that the within action be and it is hereby dismissed. This order of dismissal disposes of all matters pending in this case.

DATED: May 10, 1968.

/s/ Albert Lee Stephens, Jr.
United States District Judge

APPENDIX B

STATUTES INVOLVED

Section 1350 of the California Labor Code provides:

> No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodginghouse, apartment house, hospital, beauty shop, barbershop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by any express or transportation company in this state, more than eight hours during any one day of 24 hours or more than 48 hours in one week, *except as provided in Section 1350.5*.

The italicized portion and a special savings provision were added in 1967 after the institution of this action. The exception section 1350.5 provides:

> (a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week.
>
> (b) The provisions of subdivision (a) shall not apply to: (1) employers whose employees are exempted in Section 13 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act; (2) employers whose employees are exempted in Section 7 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act, if the employees are not entitled under such exemptions in Section 7 to 1½ times their regular rate of pay until they have worked more than 48 hours in

one week; and (3) employers whose employees are engaged in the laundering, cleaning, or repairing of clothing, or in the clothing manufacturing industries.

(c) The provisions of subdivisions (a) and (b) of this section shall not affect or change the provision of any existing collective bargaining agreement.

(d) Notwithstanding the provisions of subdivision (b) of this section, the provisions of subdivision (a) of this section shall apply to the employment of females by airlines certificated by the federal or state government.

The special savings provision (section 1357) provides:

If any clause, sentence, paragraph, or part of this article, or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Discrimination Because of Race, Color, Religion, Sex, or National Origin

Sec. 703. (a) It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive

any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

Prevention of Unlawful Employment Practices

* * *

Sec. 706. * * * (f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the persons discriminated against shall operate to reduce the back

pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

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Effect of State Laws

Sec. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.